

“Designed to reduce people... to complete destitution”: human dignity in the active welfare state

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This paper discusses the implications for the right to a life in dignity (article 1 CFR) of the “activation turn” in the welfare state.¹ The concept of “dignity,” lacking consistent definition, has been described as a better basis for “judicial manipulation” than “principled decision making.”² Nonetheless, it is possible to discern a standard of living deemed compatible from the various references in international human rights agreements to a “decent” or “adequate” standard of living, freedom from inhuman or degrading treatment and the right to a private and family life, as well as to dignity itself.³ The “activation turn” (while the focus here is on the UK, the phenomenon is international⁴) is characterised by the requirement that social security claimants be available for paid employment and undertake compulsory activities intended to result in finding employment. Failure to comply may result in sanctions, the maximum applicable being loss of benefit for three years.⁵ To date, the most significant challenge to conditionality in the UK resulted in the rejection of a claim that the right to freedom from forced labour was violated.⁶ This paper argues that while activation of claimants is compatible with the human rights instruments,⁷ the UK’s sanctions regime may be vulnerable to challenge. The main focus is on whether a regime claimed to be designed to result in “complete destitution” can be compatible with human dignity.⁸ While the socio-economic rights instruments will be discussed, given their non-integration into UK law the key focus is on article 3, article 8 and P1-1 ECHR and their relationship to three elements of the protection of human dignity as identified by McCrudden: prohibition of inhuman and degrading treatment, individual autonomy and satisfaction of essential needs. In each case it is concluded that there is potential for violation of the right to dignity, either in individual cases or in the general operation of the policy.

¹ L Kenworthy, ‘Labour market activation’ in FG Castles, S Leibfried, J Lewis, H Obinger and C Pierson (eds), *The Oxford handbook of the welfare state* (Oxford University Press, 2010)

² C McCrudden, ‘Human dignity and judicial interpretation of human rights’ (2008) 19(4) *European Journal of International Law* 655

³ Article 1 UDHR; Article 4(1) ESC; article 7(a) and 11 ICESCR; article 3 and 8 ECHR; ILO R202; article 1 CFR

⁴ For discussion of international examples, see F Dubet and A Vérétoit, ‘Une « réduction » de la rationalité de l’acteur. Pourquoi sortir du RMI ?’ (2001) 42(3) *Revue française de sociologie* 407; K Mohr, *Soziale Exklusion im Wohlfahrtsstaat: Arbeitslosensicherung und Sozialhilfe in Großbritannien und Deutschland* (VS Verlag für Sozialwissenschaften, 2007); M Kautto, ‘The Nordic countries’ in FG Castles, S Leibfried, J Lewis, H Obinger and C Pierson (eds), *The Oxford handbook of the welfare state* (Oxford University Press, 2010)

⁵ Universal Credit Regulations 2013 no 376 reg 101-105

⁶ *R (on the application of Reilly and another) v SSWP* [2013] UKSC 68

⁷ Committee on Economic, Social and Cultural Rights, ‘General comment no 19: the right to social security (article 9)’ (E/C.12/GC/19, United Nations, 2008)

⁸ D Webster, ‘Independent review of jobseeker’s allowance (JSA) sanctions for claimants failing to take part in back to work schemes: evidence submitted by Dr David Webster’ (CPAG, 2014)

<http://www.cpag.org.uk/sites/default/files/uploads/CPAG-David-Webster-submission-Oakley-review-Jan-14_0.pdf> accessed 19 May 2014

Introduction

Social security⁹ claimants in the UK have long been subject to an obligation to “fit themselves or to keep themselves fit for service.”¹⁰ If “the balance between active and passive policies¹¹ has ebbed and flowed” over time,¹² the post-1997 “activation turn” in the welfare state¹³ has seen renewed emphasis on jobseeking requirements,¹⁴ for a wider range of claimant groups and backed by an escalating sanctions regime.¹⁵ The extent to and means by which conditionality is now enforced has generated considerable controversy¹⁶ and one unsuccessful challenge under human rights law.¹⁷ This paper considers the compatibility of the sanctions regime which underpins activation policies with the UK’s human rights obligations, specifically those regarded by McCrudden as key to the protection of human dignity.¹⁸

A definition of ‘human dignity’ and its application in the sphere of socio-economic rights is absent from the human rights instruments and the range of interpretations in scholarship and case law has reached a “challenging level of complexity.”¹⁹ The paper therefore first seeks to establish a “clear statement of principle” as opposed to the tool for “judicial manipulation” the concept represents in the eyes of McCrudden.²⁰ The focus then falls upon human dignity in the active welfare state. Section 2 outlines increasing conditionality in the UK since 1997, reflecting rejection of unconditional social rights and the embrace of paid employment as the “key to citizenship.”²¹ Section 3 interrogates the extent to which sanctions uphold the right to human dignity. The severity and duration of sanctions available in the UK post-2012 is concluded to raise questions about compliance that may require resolution by the courts.

⁹ Social security in the UK refers to cash benefits collectively, including those means tested benefits that would in some countries be classed as social assistance – see Committee of Independent Experts, ‘Conclusions XIII-4’ (Council of Europe, 1996)

¹⁰ W Beveridge, ‘Social insurance and allied services’ (Cmd 6494, HMSO, 1942)

¹¹ ‘Active’ benefits are those which require the claimant to be available for employment, to seek employment and increasingly to take part in other activities designed to increase employability; ‘passive’ or ‘inactive’ benefits are paid to categories of claimant who are not required to actively seek employment

¹² D Freud, ‘Reducing dependency, increasing opportunity: options for the future of welfare to work’ (DWP, 2007)

¹³ L Kenworthy, n1

¹⁴ See Department for Social Security, ‘Opportunity for all: tackling poverty and social exclusion’ (Cm 4445, DSS, 1999); T Blair, ‘Beveridge revisited: a welfare state for the 21st century’ in R Walker (ed), *Ending child poverty: popular welfare for the 21st century?* (Policy Press, 1999); Department for Work and Pensions, ‘Universal credit: welfare that works’ (Cm 7957, 2010)

¹⁵ This trend is international – see F Dubet and A V  r  tout, n4; K Mohr, n4; M Kautto, n4

¹⁶ T Montgomerie, ‘The return of the nasty party? The end of compassionate conservatism? Or the beginning of an honest approach to fighting poverty?’ (Conservative Home, 25 June 2012)

<<http://www.conservativehome.com/thetorydiary/2012/06/the-return-of-the-nasty-party-the-end-of-compassionate-conservatism-or-the-beginning-of-an-honest-ap.html>> accessed 19 May 2014; N Sturgeon, ‘Foreword from the Deputy First Minister’ in Scottish Government, ‘Child poverty strategy for Scotland: our approach 2014-2017’ (Scottish Government, 2014)

¹⁷ *Reilly* [2013] n6 – although the challenge on the basis of article 4 ECHR failed, the Supreme Court found for the applicant on other grounds

¹⁸ Article 4(1) ESC; article 7(a) and 11 ICESCR; article 3 and 8 ECHR; ILO R202

¹⁹ C Dupre, ‘Unlocking human dignity: towards a theory for the 21st century’ (2009) 2 EHRL Rev 190

²⁰ C McCrudden, n2

²¹ R Lister, *Citizenship: feminist perspectives* (Palgrave Macmillan, 2003)

1. Dignity in human rights law

Human dignity is a core concept in human rights law. UDHR states that “recognition of the inherent dignity... of all members of the human family is the foundation of freedom, justice and peace.”²² The concept has been described as “the very essence” of ECHR.²³ However, a precise definition is elusive. McCrudden views the concept as at best context-dependent, at worst a basis for “judicial manipulation” with greater potential to muddy than to clarify legal positions.²⁴ While Carozza argues that the inviolability of human dignity underpins a clearly identifiable “‘minimum’, but hard, core” of protection from certain severe rights violations, he acknowledges that beyond this, including in the field of socio-economic rights, McCrudden’s claim has some foundation.²⁵

Some debate exists as to whether human dignity represents a right in itself, as suggested by article 1 CFR,²⁶ or an overarching concept that serves as the foundation of *all* human rights.²⁷ This paper adopts McCrudden’s perspective of dignity as an overarching concept protected by four “substantive areas” of human rights law: prohibition of inhuman treatment, assurance of individual choice or autonomy, protection of group identity or culture and creation of the conditions for satisfaction of essential needs.²⁸ The welfare state has a role to play in upholding rights under all but the third of these headings. Other authors broadly support McCrudden’s analysis. Riley stresses the fundamentality of the link between dignity and freedom from inhuman and degrading treatment, while Dupre focuses on its potential to act as a “bridge” between the civil right to autonomy and the socio-economic right to satisfaction of essential needs.²⁹

The international instruments are clear that socio-economic rights are crucial to the protection of human dignity; articles 22 and 23 UDHR protect rights to social security and “realisation... of the economic, social and cultural rights indispensable for... dignity” and to remuneration capable of ensuring “an existence worthy of human dignity,” supplemented by social protection if necessary. References to dignity also appear in ICCPR,³⁰ ICESCR,³¹ UNCRC³² and the revised ESC,³³ as well as in

²² Preamble to Universal Declaration of Human Rights, adopted by General Assembly Resolution 217A (III) of 10 December 1948

²³ *Pretty v United Kingdom* (app 2346/02) [2002] 35 EHRR 1 H18; Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, entry into force of current text 1 June 2010, ETS005)

²⁴ C McCrudden, n2

²⁵ PG Carozza, ‘Human dignity and judicial interpretation of human rights: a reply’ (2008) 19(5) EJIL 931

²⁶ Charter of Fundamental Rights of the European Union (2007/C 303/01) (CFR); for a critical view of human dignity as a “right-in-itself,” see M Neal, ‘Respect for human dignity as “substantive basic norm”’ (2014) 10(1) IJLC 26

²⁷ D Mamberti, ‘Statement by Msgr Dominique Mamberti, secretary for relations with states and head of the Holy See delegation’ (High level meeting of the 67th General Assembly on the rule of law at the national and international levels, New York, September 2012)

<http://www.vatican.va/roman_curia/secretariat_state/2012/documents/rc_seg-st_20120924_rule-of-law_en.html> accessed 19 May 2014; see also C Dupre, n19

²⁸ C McCrudden, n2

²⁹ C Dupre, n19; S Riley, ‘Human dignity: comparative and conceptual debates’ (2010) 6(2) IJLC 117

³⁰ International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, UNTS vol 999 p171

³¹ International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200A (XXI), 16 December 1966, entry into force 3 January 1976, UNTS vol 993 p3

³² Convention on the Rights of the Child, adopted by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990 UNTS vol 1577 p3

discussion of the incorporation of socio-economic rights into ECHR.³⁴ A connection can also be drawn between dignity and concepts including an “adequate” or “decent [standard of] living” (articles 7(a) and 11 ICESCR, article 4(1) ESC³⁵). The context-dependence of the concept highlighted by McCrudden need not be fatal to its use in this context: the state’s socio-economic obligations to its citizens are acknowledged to depend on “the standards prevailing” in society,³⁶ “maximum available resources,”³⁷ median income³⁸ or the goods deemed necessary to a normal lifestyle.³⁹

Although human dignity is relevant to the full range of human rights instruments, the primary focus here is on ECHR. As the only international human rights agreement to be incorporated into the domestic law of the UK,⁴⁰ it is on it that any legal challenge to sanctions in the welfare state would have to rely. While ratification of others signals intention that “domestic law and practice” should be “consistent with them”⁴¹ and requires Ministers to comply with their provisions,⁴² infringement cannot be challenged in the courts.⁴³ However, the use by ECtHR of other instruments as aids to interpretation of the Convention rights⁴⁴ means these will be drawn on in discussion. The ECHR provisions of most relevance are article 3 (prohibition of inhuman and degrading treatment), article 8 (respect for private and family life, relevant to individual autonomy and satisfaction of essential needs) and P1-1 (protection of property, relevant to satisfaction of essential needs).

Although not unanimous as to the level of resources required, the various human rights instruments discussed are broadly in agreement that human dignity demands the resources necessary for a minimum standard of living. An approach grounded in freedom from inhuman or degrading treatment confers only a very basic level of protection, while the application of self-determination to socio-economic rights thus has far been limited in the active welfare state. Provisions relevant to the satisfaction of essential needs indicate that no member of a society should have an income or access to goods and services too far removed from the norm. Whether this standard of living is within reach

³³ European Social Charter (revised) (Strasbourg, 3 May 1996, entry into force 1 July 1999, CETS 163) – the UK is not a signatory to the revised Charter

³⁴ Working Group on Social Rights, ‘Steering committee for human rights: working group on social rights report’ (GT-DH-SOC(2005)007, Council of Europe, 2005)

³⁵ European Social Charter (Turin, 18 October 1961, entry into force 26 February 1965, CETS 035)

³⁶ TH Marshall, ‘Citizenship and social class’ in TH Marshall and T Bottomore, *Citizenship and Social Class* (Pluto, 1992)

³⁷ Committee for Economic, Social and Cultural Rights, ‘General comment no 3 (1990)’ in Economic and Social Council, ‘Official records 1991, supplement no 3’ (E/1991/23, United Nations, 1991)

³⁸ Child Poverty Act 2010 c9 s3

³⁹ S McKay and S Collard, ‘Developing deprivation questions for the Family Resources Survey’ (Working paper no 13, University of Bristol, 2003); S McKay, ‘Review of the child material deprivation items in the Family Resources Survey’ (Research report no 746, DWP, 2011)

⁴⁰ Human Rights Act 1998 c42

⁴¹ United Kingdom of Great Britain and Northern Ireland, ‘Implementation of the International Covenant on Economic, Social and Cultural Rights: fifth periodic reports submitted by states parties under articles 16 and 17 of the Covenant’ (E/C.12/GBR/5, United Nations Economic and Social Council, 2008)

⁴² HM Government, ‘Ministerial code’ (Cabinet Office, 2010) para 1.2

⁴³ *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143 (Diplock LJ); *In the matter of an application by Caoimhin Mac Giolla Cathain for judicial review* [2009] NIQB 66

⁴⁴ *Sidabras v Lithuania* application 55480/00, 59330/00 [2006] 42 EHRR 6; *Demir v Turkey* (app 34503/97) [2009] 48 EHRR54 para 85

of benefit claimants in general can be questioned;⁴⁵ claimants subject to sanctions will inevitably find it more difficult to achieve.

2. The active welfare state

The extent to which a welfare state should provide for citizens' decommodification – the ability to meet one's essential needs without recourse to the labour market⁴⁶ – has long been a matter for academic debate.⁴⁷ Marshall's view of financial support when required as a citizen's "moral right"⁴⁸ has been interpreted as an endorsement of "unconditional entitlement to welfare,"⁴⁹ but by no means universally. Powell sees Marshall as comfortable with Beveridge's focus on the worker-citizen, with the full benefits of the welfare state aimed at "insured persons,"⁵⁰ while Lister stresses Marshall's adherence to a "duty to work."⁵¹

In practice, the UK welfare state has sought to *avoid* decommodification and maximise labour market participation.⁵² Recent increases in emphasis on the activation of social security claimants⁵³ – policies designed to move claimants from benefits to employment – can be linked with concerns about the sustainability of 20th century welfare state models in an era of globalisation, deindustrialisation, ageing and individualism.⁵⁴ However, if the United States explicitly rations access to social assistance,⁵⁵ European discourses have foregrounded the benefits to both the claimant and society of labour market engagement.⁵⁶ From this perspective, paid employment not only serves as the "best route out of poverty,"⁵⁷ but supplants military service and political activity as the "key to

⁴⁵ D Hirsch, 'A minimum income standard for the UK in 2013' (Joseph Rowntree Foundation, 2013)

⁴⁶ JD Stephens, 'The social rights of citizenship' in FG Castles, S Leibfried, J Lewis, H Obinger and C Pierson (eds), *The Oxford handbook of the welfare state* (Oxford University Press, 2010)

⁴⁷ See, for example, R Plant, 'Supply side citizenship?' (1999) 6(3) *Journal of Social Security Law* 124; J Maskivker, 'He who shall not work shall eat: a case for the right to opt out of employment' (PhD thesis, Columbia University, 2009)

⁴⁸ TH Marshall, 'The right to welfare' in *The right to welfare and other essays* (Heinemann, 1981)

⁴⁹ P Dwyer, 'Creeping conditionality in the UK: from welfare rights to conditional entitlements?' (2004) 29(2) *Canadian Journal of Sociology* 265

⁵⁰ M Powell, 'The hidden history of social citizenship' (2002) 6(3) *Citizenship Studies* 229; see also R Plant, n47

⁵¹ R Lister, 'Citizenship, exclusion and "the Third Way" in social security reform: reflections on T.H. Marshall' (2000) 7(2) *JSSL* 70

⁵² W Beveridge, n10; M Powell, n50; *Welfare Reform Act 2012* c5 s16-18

⁵³ See, for example, Department for Work and Pensions, 'A new deal for welfare: empowering people to work' (DWP, 2006); D Freud, n12; Department for Work and Pensions, 'Ready for work: full employment in our generation' (Cm 7290, DWP, 2007); DWP, 2010, n14

⁵⁴ See I Culpitt, *Welfare and citizenship: beyond the crisis of the welfare state?* (Sage, 1992); D Béland and R Hansen, 'Reforming the French welfare state: solidarity, social exclusion and the three crises of citizenship' (2000) 23(1) *W Euro Pol* 47; W van Oorschot, 'Solidarity towards immigrants in European welfare states' (2008) 17(3) *IJ Soc Welfare* 3; P Taylor-Gooby, *Reframing social citizenship* (Oxford University Press, 2009)

⁵⁵ Support under the Temporary Assistance for Needy Families programme is largely restricted to a maximum of five years in the lifetime – see Office of Family Assistance, 'Major provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193)' (HHS, 1996)

⁵⁶ See, for example, Council Recommendation 92/441/EEC on common criteria concerning sufficient resources and social assistance in social protection systems; T Blair, n14; DSS, 1999, n14

⁵⁷ DWP, 2010, n14

citizenship,”⁵⁸ the individual’s main contribution to society and the way in which he or she gains personal fulfilment and social integration.⁵⁹

One consequence of the construction of employment as the primary means of discharging one’s responsibilities to society has been the compulsion of a progressively wider group of claimants to actively seek employment or to engage in activities designed to improve employment prospects. Groups once “recognised as making socially valid contributions elsewhere (e.g. women engaged in informal/familial care work)” or considered too ill to be required to seek employment have been increasingly integrated into a conditionality regime that has “become central to the organisation of contemporary public welfare.”⁶⁰ Claimants of long term sickness benefits and lone parents have been key targets.⁶¹ The replacement of a range of out-of-work benefits with a single universal credit emphasises the erosion of boundaries between claimant groups, although that is not to say that all claimants will be treated alike.

A second element of the “activation turn” is the escalation of sanctions applied to claimants who without “good reason”⁶² fail to comply with conditions linked to their benefit. The maximum penalty is now 156 weeks’ loss of benefit, compared to six weeks before 1986.⁶³ Meanwhile, support available to claimants subject to sanctions has become less generous.⁶⁴ The table below outlines the most recent escalation of jobseeker’s allowance sanctions.

The severity of sanction that can be imposed has led Webster to describe the UK’s conditionality regime as “deliberately designed to reduce people without other resources to complete destitution” if they fail to comply with obligations attached to receipt of benefit.⁶⁵ In light of this assessment, it is necessary to consider the compatibility of the system with the state’s human rights obligations. Destitution is defined in legislation as lacking “adequate accommodation or any means of obtaining it” or “other essential living needs,” including those of a dependent.⁶⁶ If Webster is correct, and the sanctions imposed on claimants who fail to fulfil set conditions *do* result in destitution in accordance with this definition, then human dignity as defined by McCrudden might be violated as the penalty imposed by the state would prevent the claimant meeting his or her essential needs.

⁵⁸ R Lister, n21

⁵⁹ G Delanty, *Citizenship in a global age: society, culture and politics* (Open University Press, 2000); D Béland and R Hansen, n54; N Hibbert, ‘Is workfare egalitarian?’ (2007) 3(2) *Pol & Ethics Rev* 200

⁶⁰ P Dwyer, n49

⁶¹ Welfare Reform Act 2007 c5 s11-16; Welfare Reform Act 2012 c5 s16, 20-21; Universal Credit Regulations 2013 no 276 reg 91A, inserted by Income Support (Work Related Activity) and Miscellaneous Amendments Regulations 2014 no 1097 reg 16; see also D Freud, n12

⁶² See Department for Work and Pensions, ‘Sanctions’ in *Decision makers’ guide: vols 4, 5, 6 and 7: jobseeker’s allowance and income support: staff guide* (DWP, 2014)

<<https://www.gov.uk/government/publications/decision-makers-guide-vols-4-5-6-and-7-jobseekers-allowance-and-income-support-staff-guide>> accessed 19 May 2014

⁶³ For current legislation on conditionality and sanctions, see Jobseekers Act 1995 c18 part i; Jobseeker’s Allowance (Mandatory Work Activity) Regulations 2011 no 688; Welfare Reform Act 2012 c5 part 1 chapter 2, part 2 chapter 1-2; for information on the sanctions process, see DWP, 2014, n62

⁶⁴ D Webster, n8

⁶⁵ D Webster, n8

⁶⁶ Immigration and Asylum Act 1999 c33 s95

Table: Escalation of jobseeker's allowance sanctions from October 2012⁶⁷

Sanction level	Lower	Intermediate	Higher
Failure	Failure to: attend adviser interview; participate in or attend employment or training programme; comply with a jobseeker direction	Not being available for work; not actively seeking work	Leaving a job voluntarily; losing a job through misconduct; failure to apply for/accept a suitable job or participate in mandatory activity
First failure	4 weeks	4 weeks	13 weeks
Second failure	4 weeks	13 weeks	26 weeks
Third failure	13 weeks	13 weeks	156 weeks
Sanction prior to October 2012	1, 2, 4 or 26 weeks	<i>Disallowance while failure continues; no additional sanction</i>	1-26 weeks

Source: DWP⁶⁸

3. Conditional welfare and human dignity in the UK

While the texts of the international agreements contain no clear statement, it is well established that compulsory measures to assist with the movement of claimants from benefits to employment are compatible with claimants' human rights, even desirable. The Supreme Court has held that an obligation to accept an offer of employment or undertake a work placement does not violate the prohibition of forced labour in article 4 ECHR.⁶⁹ ECtHR judgements cited emphasise that work-related obligations are a normal feature of unemployment benefits.⁷⁰ Similarly, ECSR considers that states are entitled to make social assistance conditional on compliance with "reasonable" jobseeking or training requirements⁷¹ and to withhold benefit payments in the event of refusal to accept an offer of suitable employment⁷² without infringing the right to free choice of occupation in article 1(2) ESC. The question for this paper, therefore, is not whether sanctions in principle violate human dignity, but whether the sanctions regime in the UK does so, given that the maximum sanction today (see section 2) is significantly greater than the maximum that could be imposed in the UK or Germany at the time of the reports cited.⁷³

In considering the compatibility of sanctions in the UK with human rights instruments, use will be made of McCrudden's three "substantive areas" of human rights law. A finding of incompatibility

⁶⁷ The current sanction consists of suspension of jobseeker's allowance payments; following the amalgamation of out-of-work benefits, the sanction will consist of suspension of the standard allowance element of universal credit, or 50% thereof in the case of joint claims, although some exceptions apply – see Universal Credit Regulations 2013 no 376 reg 111

⁶⁸ Department for Work and Pensions, 'Important changes to jobseeker's allowance sanctions from Monday 22 October 2012' (C&S factsheet, DWP, 2012)

⁶⁹ *Reilly* [2013] n6

⁷⁰ *X v Netherlands* (app 7602/76) [1976] 7 DR 161; *Schuitmaker v Netherlands* (app 15906/08) [2010] (unreported) 4 May 2010

⁷¹ *European Roma Rights Centre v Bulgaria* (complaint 48/2008) [2009] 49 EHRR SE12

⁷² European Committee of Social Rights, 'European Social Charter: addendum to conclusions XV-1' (Council of Europe, 2001); European Committee of Social Rights, 'Conclusions XVII-1' (Council of Europe, 2004)

⁷³ In the UK, loss of jobseeker's allowance for 26 weeks; in Germany, a 25% reduction of benefit

with the first, freedom from inhuman and degrading treatment, would be the most damaging to the sanctions regime due to the impossibility of derogation or exceptions from article 3 ECHR.⁷⁴ However, a very high threshold of destitution would have to be passed for violation to be found. The limited extent to which article 8 ECHR creates positive obligations likewise means rights to individual autonomy may only be breached in limited circumstances. There does appear to be a greater likelihood of sanctions infringing rights to access essential needs, although justiciability in the UK would depend on the right being grounded in a relevant ECHR provision and not only in one of the agreements on socio-economic rights.

3.1.1 Freedom from inhuman and degrading treatment

Article 3 ECHR (article 4 CFR is worded identically) has been described as the embodiment of a “collective undertaking... not to drift back into an era when... ill-treatment [was] considered an inevitable and even a respectable tool of government policy.”⁷⁵ Webster claims such a drift is observable in the welfare state, with sanctions “deliberately designed to reduce people without other resources to complete destitution.”⁷⁶ However, destitution does not always indicate inhuman or degrading treatment.⁷⁷ To infringe article 3, sanctions would have to place the claimant in the circumstances envisaged in *Limbuela*, that is he or she should through the “deliberate action” of the state be “to a seriously detrimental extent” denied “the most basic needs of any human being,” notably food or shelter, with no prospect of receiving these from another source, for example familial or charitable.⁷⁸ Dependence on charitable support is *not* considered degrading.

The first element of the *Limbuela* judgement is the requirement of “deliberate action” by the state. In *Q*, it was emphasised that the denial of support to asylum seekers *in combination with* the prohibition of paid employment (similar circumstances to those in *Limbuela*) constituted “positive action directed against asylum seekers and not... mere inaction.”⁷⁹ It might on this basis be possible to suggest that the loss of benefits experienced by a claimant who fails to fulfil conditions results from the actions of the claimant rather than the state. However, it is argued here that the interference of the state with a proprietary right protected by P1-1 ECHR and already being enjoyed by the claimant (see section 3.1.2) *does* represent a “positive action” and may therefore engage article 3.

Second, how should denial of “basic necessities” be understood? In the ordinary meaning of the phrase, it appears possible to draw parallels with McCrudden’s reference to “essential needs” (see section 3.1.2), with the emphasis in *Limbuela* placed on food and shelter. Given the existence of food banks,⁸⁰ hardship payments to sanctioned claimants otherwise unable to meet basic needs⁸¹

⁷⁴ *Kuznetsov v Russia* (app 22027/08) [2011] 53 EHRR SE22 para 17; see also *Soering v United Kingdom* (A/161) [1989] 11 EHRR 439 para 88; *Chalan v United Kingdom* (app 22414/93) [1996] 23 EHRR 413 para 79;

⁷⁵ N Grief and MK Addo, ‘Is there a policy behind the decisions and judgements relating to article 3 of the European Convention on Human Rights?’ (1995) 20(2) *European Law Review* 183

⁷⁶ D Webster, n8

⁷⁷ *R on the application of Q v SSHD* [2003] EWCA Civ 364 para 59 (Lord Phillips, MR)

⁷⁸ *R (on the application of Limbuela) v SSHD*; *R (on the application of Tesema) v SSHD*; *R (on the application of Adam) v SSHD* [2005] UKHL 66 para 7 (Lord Bingham); see also para 35 (Lord Hope); para 66-69 (Lord Scott)

⁷⁹ *Q* [2003] n77 para 57 (Lord Phillips, MR)

⁸⁰ Trussell Trust, ‘Latest foodbank figures top 900,000: life has got worse not better for the poorest in 2013/14, and this is just the tip of the iceberg’ (Trussell Trust, 2014) <<http://www.trusselltrust.org/foodbank-figures-top-900000>> accessed 19 May 2014

and the fact that housing benefit is not subject to sanction, the number of cases in which such needs cannot be met might be expected to be small. Nonetheless, Webster argues that the two-week delay before a hardship payment is available, the discretionary nature of such payments and the fact that in practice housing benefit is interrupted when jobseeker's allowance payments stop means there is a genuine possibility that some claimants will experience difficulty in satisfying these needs.⁸²

The third, and crucial, point in respect of article 3 is that "basic necessities" must not merely be denied; the denial must be of sufficient severity and duration to have "seriously detrimental" effects or to cause "serious suffering."⁸³ Case law cited refers to "actual bodily injury or intense physical or mental suffering" and to treatment that shows "a lack of respect for... human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance."⁸⁴ The factors to be discussed in section 3.1.2 will be of relevance to determining whether inhuman or degrading treatment takes place and whether it is caused by the actions of the state. However, whereas in the following section the key question will be whether resources necessary for the satisfaction of essential needs are provided, for the purposes of article 3 a negative answer must be followed by consideration *on a case-by-case basis* of whether the impact on an individual claimant of an otherwise lawful policy breaches his or her article 3 right.⁸⁵

3.1.2 Creation of the conditions for the satisfaction of essential needs

The creation of the conditions for satisfaction of essential needs is a concern of numerous human rights provisions. "Essential needs" are not limited to those things physically necessary for survival: in article 11 ICESCR, an "adequate standard of living," including "adequate food," does not merely imply a minimum of "specific nutrients," but demands holistic consideration of "whether particular foods or diets that are accessible can be considered the most appropriate" according to criteria including social and cultural factors.⁸⁶ Housing-related rights tend to be less ambitious, with article 11 ICESCR and article 8 ECHR requiring protection from unlawful or arbitrary eviction rather than the provision of housing.⁸⁷

In an urbanised society, the realisation of socio-economic rights, such as those to food and housing, depends on access to the necessary financial resources. The socio-economic rights instruments are divided as to what constitutes a sufficient income for this purpose, although there is some

⁸¹ Jobseeker's Allowance Regulations 1996 no 207 reg 145; Universal Credit Regulations 2013 no 376 reg 116-118

⁸² D Webster, n8

⁸³ *Limbuela* [2005] n78 para 7-8 (Lord Bingham)

⁸⁴ *V v United Kingdom* (app 24888/94) [2000] 30 EHRR 121 para 71; *Pretty* [2002] n23 para 52

⁸⁵ *Price v United Kingdom* (app 33394/96) [2004] 34 EHRR 53 para 24; *R (on the application of Limbuela) v SSHD*; *R (on the application of Tesema) v SSHD*; *R (on the application of Adam) v SSHD* [2004] EWCA Civ 540 para 50 (Laws LJ)

⁸⁶ Committee on Economic, Social and Cultural Rights, 'General comment 12: the right to adequate food (article 11)' (E/C.12/1999/5, United Nations, 1999)

⁸⁷ Committee on Economic, Social and Cultural Rights, 'General comment no 7: the right to adequate housing (article 1 paragraph 1 of the Covenant)' in Economic and Social Council, 'Official records, 1998: supplement no 2' (E/1998/22, United Nations, 1998); *Brice and another v LB Southwark* [2001] EWCA Civ 1138 para 21 (Kennedy LJ); *R (on the application of HC) v SSWP, SS Loc Govt and Communities, HMRC v Oldham Met BC* [2013] EWHC 3874 (Admin) para 71 (Supperstone J)

consensus that a minimum standard, probably of at least 50% of median income, exists.⁸⁸ Although ECHR confers no explicit right to have essential needs met, article 8 and P1-1 are relevant to its realisation. P1-1 brings entitlement to social protection – payments designed to ensure individuals without other sources of income can satisfy their essential needs⁸⁹ – within the scope of protection afforded to property rights,⁹⁰ while article 8 may create a positive obligation to provide financial support when the essential needs of children are at stake.⁹¹

Guidance on what constitute essential needs in the UK can be found in case law on support for asylum seekers. When not provided with full board, such individuals receive furnished accommodation with council tax and utility bills paid, plus a monthly cash (or voucher) allowance.⁹² The allowance – £36.54 for a single person – was held in *Refugee Action* to be inadequate as it had not increased between 2011 and 2014 and because of failure to consider the cost of items that might or ought to have been classed as essential needs.⁹³ In contrast to *Limbuela*, although charitable food aid had potential to alleviate destitution, it could not be considered an adequate means of meeting essential needs.⁹⁴ This judgement is instructive when considering the circumstances of claimants subject to sanctions. Evidently, those *not* in receipt of a hardship payment would be unable to meet their basic needs. For those who *do* receive such payments, it appears questionable whether the £43.44 payable to a single person would be sufficient, given that £36.54 was deemed insufficient for an asylum seeker supplied with furniture and not liable for utility bills.⁹⁵ The Secretary of State's claim that a benefit intended to be temporary could legitimately be paid at a much lower level than a long-term benefit was rejected on the basis that an average claim duration of 18 months could not be regarded as "temporary" in any meaningful sense; this finding is again relevant as the maximum duration of a sanction could be twice as long.⁹⁶

Unlike article 3 ECHR, the articles in which a right to satisfaction of essential needs might be grounded – article 8 and P1-1 – are not absolute. Justifiable interference with the right based on a claimant's failure to abide by conditions recognised in case law and by ECSR as a normal feature of

⁸⁸ See Committee of Independent Experts, *Conclusions XIV-2 vol 1* (Council of Europe, 1998-2000); International Labour Organisation Convention 102 – Social Security (Minimum Standards) Convention (Geneva, 28 June 1952, entry into force 27 April 1955); European Committee of Social Rights, 'European Social Charter: conclusions XX-2 (2013) (Great Britain)' (Council of Europe, 2014)

⁸⁹ R Lowe, *The welfare state in Britain since 1945* (Macmillan, 1999); RE Goodin, B Headey, R Muffels and H-J Dirven, *The real worlds of welfare capitalism* (Cambridge University Press, 1999); C Alcock, S Payne and M Sullivan, *Introducing social policy* (Pearson Prentice Hall, 2000)

⁹⁰ *Stec v UK* (app 65731/01, 65900/01) [2006] 43 EHRR 47; for discussion, see I Leijten, 'From *Stec* to *Valkov*: possessions and margins in the social security case law of the European Court of Human Rights' (2013) 13 *European Human Rights Law Review* 309

⁹¹ *HC* [2013] n87 para 71 (Supperstone J)

⁹² Asylum Support Regulations 2000 no 704 reg 10-11; *R on the application of Refugee Action v SSHD* [2014] EWHC 1033 (Admin) para 11 (Poplewell J)

⁹³ *Refugee Action* [2014] n92

⁹⁴ *Refugee Action* [2014] n92 para 147 (Poplewell J)

⁹⁵ The jobseeker's allowance hardship payment is 60% of the normal rate in most circumstances; the normal rate of JSA is £72.40 if aged over 25, so the equivalent hardship payment would be £43.44 – see Jobseeker's Allowance Regulations 1996 no 207 reg 145; Universal Credit Regulations 2013 no 376 reg 116-118; Jobseeker's Allowance Regulations 2013 no 378 reg 49, as amended by Welfare Benefits Up-rating Order 2014 no 147 art 10

⁹⁶ *Refugee Action* [2014] n92 para 141-142 (Poplewell J)

out-of-work benefits⁹⁷ need not therefore violate these rights. However, the justifiability in principle of sanctions does not necessarily mean UK policy is in every respect lawful. Interference with the right to protection of property under P1-1 is only permitted in accordance with the law and public interest, while interference with the right to respect for private and family life under article 8 must be in accordance with the law and “necessary in a democratic society.”

The public interest test under P1-1 requires that any interference with the right be proportionate and non-arbitrary.⁹⁸ Webster argues that there is a “grotesque disproportion” between the extent of sanction available and the severity of “offence” on the part of the claimant,⁹⁹ some individuals reportedly having been sanctioned for falling marginally short of the amount of jobseeking activity required, others for failure to adhere to conditions that are “literally impossible,” such as attendance at two simultaneously scheduled appointments.¹⁰⁰ Proportionality of sanctions was considered in *EUROCEF*, in which suspension of family benefit as a deterrent to truancy from school was held to infringe article 16 ESC (the right of the family to social, legal and economic protection) because “disproportionate to the aim pursued.” The measure was also held to be of questionable efficacy and likely to exacerbate the economic hardship and social vulnerability at the root of inability to “fulfil parental responsibilities.”¹⁰¹ Sanctions imposed on benefit claimants have similarly been claimed to be counterproductive as they may cause or exacerbate mental health problems that act as a barrier to employment,¹⁰² or decrease quality of jobseeking as they increase its intensity.¹⁰³

Imposition of sanctions might in some respects be describable as arbitrary. Notably, benefit payments may be suspended *while a sanction is being considered*, but before a decision has actually been taken,¹⁰⁴ potentially in breach of P1-1 which in *some* circumstances prohibits a decision

⁹⁷ X [1976] n70; *European Roma Rights Centre* [2009] n71; *Schuitemaker* [2010] n70; ECSR, 2001, n72

⁹⁸ PT Orebech, ‘From diplomatic – to human rights protection: the possessions under the 1950 European Human Rights Convention, first additional protocol article 1’ (2009) 43(1) *Journal of World Trade* 59

⁹⁹ D Webster, n8

¹⁰⁰ D Webster, n8; see also Broadway and St Mungo’s, ‘Independent review of jobseeker’s allowance sanctions joint response: Broadway and St Mungo’s’ (St Mungo’s, 2014)

<http://www.mungos.org.uk/homelessness/publications/latest_publications_and_research/1767_broadway-and-st-mungo-s-joint-submission-to-independent-review-of-jobseeker-s-allowance-sanctions> accessed 19 May 2014; S Duffy and R McHugh, ‘Gipsil Advice Service response to Independent Review of Jobseeker’s Allowance Sanctions to be undertaken by Matthew Oakley’ (CPAG, 2014)

<<http://www.cpag.org.uk/sites/default/files/uploads/Gipsil%20Advice%20Service%20response%20to%20Independent%20Review%20of%20Jobseeker.pdf>> accessed 19 May 2014; G Lewis, ‘Wheatley Group response to independent review of JSA sanctions’ (CPAG, 2014)

<<http://www.cpag.org.uk/sites/default/files/uploads/Wheatley%20Group%20final%20response%20-%20sanctions%20review.pdf>> accessed 19 May 2014

¹⁰¹ *European Committee for Home-based Priority Action for the Child and the Family v France* (complaint 82/2012) [2013] 57 EHRR SE21 para 38-42

¹⁰² S Wright, ‘On “activation workers’ perceptions”: a reply to Dunn (2)’ (2014) *FirstView* article, JSP; Anonymous, ‘Welfare reforms prompt sanctions warning’ (2006) March issue, *Mental Health Today* 7; Manchester CAB Service, ‘Punishing Poverty? A review of benefits sanctions and their impacts on clients and claimants’ (CPAG, 2014)

<<https://skydrive.live.com/view.aspx?resid=CB5ED957FE0B849F1350&app=WordPdf&wdo=2&authkey=!AJTbB-gzwsSCayQ>> accessed 19 May 2014

¹⁰³ J Griggs and M Evans, ‘Sanctions within conditional benefit systems: a review of evidence’ (Joseph Rowntree Foundation, 2010); G Lewis, n100

¹⁰⁴ L Judge, ‘Independent review of jobseeker’s allowance sanctions: CPAG’s response to the call for information’ (CPAG, 2014)

affecting an individual's enjoyment of his or her property being taken in advance of "adversarial proceedings."¹⁰⁵ This also raises issues of compliance with article 13 ESC, which requires that social assistance be paid *as of right* as long as applicable conditions are met (and, presumably, as long as they have not been demonstrated to be breached).¹⁰⁶ Even if a pre-emptive decision to cease payments does not infringe P1-1, a decision might fail the non-arbitrariness test if affected claimants had no access to a meaningful appeal mechanism, essential to the compatibility of sanctions with article 1(2) ESC.¹⁰⁷ Webster argues that this is often the case in practice, given that reasons for the sanction are not routinely offered, that claimants are not always informed of their right to appeal¹⁰⁸ and the removal of entitlement to legal aid for appeals to tribunal.¹⁰⁹ Although High Court has held it would be "premature" to find that the imposition of a fee for access to an employment tribunal would hinder access to justice, despite evidence of a "deterrent effect,"¹¹⁰ it does not follow that the same would apply to the appeals process against sanctions.¹¹¹ Reports that staff perceive that they are subject to targets to impose a certain number of sanctions¹¹² must raise further concerns about benefits being withdrawn arbitrarily to achieve the supposed target rather than on the basis of clear failings on the part of claimants, although this would appear to apply to individual cases rather than policy.

Article 8 seldom creates any "positive obligation to provide financial assistance to support a person's family life,"¹¹³ but may be engaged in cases involving a decision on an interim payment or suspension of benefit if a claimant has dependent children.¹¹⁴ Relevant aids to interpretation here include the article 3(1) UNCRC requirement that the "best interests" of the child be a "primary

<<http://www.cpag.org.uk/sites/all/modules/contrib/pubdlnct/pubdlnct.php?file=/sites/default/files/CPAG-response-JSA-sanctions-call-for-information-Jan-14.pdf&nid=1802>> accessed 19 May 2014; West Dunbartonshire Citizens Advice Bureau, 'Unjust and uncaring: a report on conditionality and benefit sanctions and their impact on clients' (Citizens Advice Bureau, 2014)

<<http://www.cas.org.uk/system/files/Unjust%20and%20Uncaring.pdf>> accessed 19 May 2014

¹⁰⁵ *Hentrich v France* (app 13616/88) [1994] 18 EHRR 440 para 2; *R on the application of SRM Global Master Fund LP v Commissioners of HM Treasury* [2009] EWHC 227 (Admin) para 81 (Stanley Burton LJ and Silber J)

¹⁰⁶ *European Roma Rights Centre* [2009] n71; Committee of Independent Experts, *Conclusions I* (Council of Europe, 1969); European Committee of Social Rights, 'Conclusions XIV-1: general introduction' (Council of Europe, 1998)

¹⁰⁷ ECSR, 2001, n72

¹⁰⁸ Reconsideration is requested by 25% of sanctioned claimants, with appeals submitted by only 1.7%, despite success rates of 50% and 42% respectively – D Webster, n8; see also N Hodgkinson, Advice Network and Training Partnership, Bradford and District submission to independent review of jobseeker's allowance (CPAG, 2014)

<<http://www.cpag.org.uk/sites/default/files/uploads/The%20Advice%20Network%20and%20Training%20Partnership%20Bradford.pdf>> accessed 19 May 2014; Manchester CAB Service, n102

¹⁰⁹ D Webster, n8

¹¹⁰ *R on the application of Unison v Lord Chancellor v Equality and HR Commission* [2014] EWHC 218 (Admin) para 45-46 (Moses LJ)

¹¹¹ One objective underlying the introduction of charges for the employment tribunal was the promotion of conciliation, which is less likely to be an option in the case of challenges to social security decisions – see *Unison* [2014] n110 para 43 (Moses LJ)

¹¹² P Wintour, 'Jobcentre was set targets for benefit sanctions' (Guardian, 21 March 2013)

<<http://www.theguardian.com/society/2013/mar/21/jobcentre-set-targets-benefit-sanctions>> accessed 19 May 2014; N Couling, 'Conditionality and sanctions: report to the Secretary of State' (DWP, 2013)

¹¹³ *HC* [2013] n87 para 71 (Supperstone J)

¹¹⁴ *Ala Anufrijeva v LB Southwark*; *R on the application of N v SSHD*; *R on the application of M v SSHD* [2003] EWCA Civ 1406 para 43 (Lord Woolf); *R on the application of Jamil Sanneh v SSWP, Commissioners for HMRC v Birmingham CC* [2013] EWHC 793 (admin) para 44-46 (Hickinbottom J)

consideration” in decisions affecting him or her (this provision has been incorporated into domestic law, although the treaty as a whole has not).¹¹⁵ ECSR has also broadly accepted the argument that the choices or actions of a parent should not result in a child’s exposure to “unfit living conditions” or violation of “the most basic rights... such as... the right to human dignity.”¹¹⁶ Hence the impact on a claimant’s children should be *a* (not necessarily *the*) primary consideration in a decision whether to apply a sanction in a given case.¹¹⁷ Where state support is necessary to avoid destitution and enable “family life to continue,” *Ala Anufrijeva* suggests there will be a particularly strong case in favour of providing such support.¹¹⁸

3.1.3 Protection of individual autonomy

Article 8 ECHR is also of relevance to the protection of individual autonomy.¹¹⁹ For ECtHR, a private life “includes a person’s physical and psychological integrity”¹²⁰ (protection of which is explicitly identified as a fundamental right by article 3(1) CFR) and “the development, without outside interference, of the personality of each individual in his relations with other human beings.” The contribution of social security to facilitating or restricting economic independence, hence autonomy, is of particular importance to domestic violence victims, whose ability to leave a relationship may depend on access to an independent income.¹²¹

Policy on conditionality recognises that victims of domestic violence may be less able to meet conditions and may have a “good reason” for leaving or declining employment.¹²² Hence a claimant who has recently left an abusive relationship may be temporarily excused from jobseeking requirements. Although it was suggested during the legislative process that the exemption should be without time limit and should be available to claimants who have *not* left the violent relationship,¹²³ the provision mitigates the potential for sanctions to pose a threat to “a person’s physical and psychological integrity” contrary to article 8 ECHR¹²⁴ by perpetuating dependence on another. If

¹¹⁵ Children (Northern Ireland) Order 1995 no 755 (NI 2); Children Act 2004 c31 s11

¹¹⁶ *Defence for Children International v Belgium* (complaint 69/2011) [2013] 56 EHRR SE20 para 26, 28

¹¹⁷ *ZH (Tanzania) v SSHD* [2011] UKSC 4 para 25 (Baroness Hale); *R on the application of SG and others (previously JS and others) v SSWP v Child Poverty Action Group, Shelter Children’s Legal Service* [2014] EWCA Civ 156 para 100 (Lord Dyson)

¹¹⁸ *Ala Anufrijeva* [2003] n114 para 43 (Lord Woolf) – it is emphasised that article 8 *only* creates such a positive obligation “where the welfare of children is at stake” – where only adults are affected, article 3 must be engaged for state support to be required

¹¹⁹ S Wheatley, ‘Human rights and human dignity in the resolution of certain ethical questions in biomedicine’ (2001) 3 EHRL Rev 312; A Pedain, ‘The human rights dimension of the Diane Pretty case’ (2003) 62(1) Cam LJ 181; P De Hert and M Eugenio, ‘Specific human rights for older persons?’ (2011) 4 EHRL Rev 398

¹²⁰ *Botta v Italy* (app 21439/93) [1998] 26 EHRR 241

¹²¹ R Lister, ‘White paper on universal credit: written evidence submitted by Ruth Lister’ (Parliament, 2010) <<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmworpen/743/743we13.htm>> accessed 19 May 2014; Ad-hoc Committee, ‘Report on whether the provisions of the Welfare Reform Bill are in conformity with the requirements for equality and observance of human rights’ (NIA 92/11-15, NI Assembly, 2013); ICF GHK Consulting, ‘Domestic violence: implementation of JSA DV easement and DDV concession – small scale qualitative research’ (Research report 843, DWP, 2013); H Siddiqui, ‘Ending the stark choice: domestic violence or destitution in the UK’ (50.50: inclusive democracy, 3 December 2013) <<http://www.opendemocracy.net/5050/hannana-siddiqui/ending-stark-choice-domestic-violence-or-destitution-in-uk>> accessed 19 May 2014

¹²² Jobseeker’s Allowance (Domestic Violence) (Amendment) Regulations 2012 no 0000 (draft) reg 2; DWP, 2014, n62

¹²³ HL Deb 27 Feb 2012 vol 735 no 271 col GC75

¹²⁴ *Botta* [1998] n120

some possibility remains, this need not necessarily infringe article 8; the state may interfere with the right “in accordance with the law and [as] necessary in a democratic society.” In this case, the Minister argued that a longer exemption than the maximum possible 24 weeks in 12 months would represent an “unacceptable” erosion of the principle that “JSA [is] a benefit for those able to seek and undertake work.”¹²⁵ If aspects of the reformed social security system remain vulnerable to criticism that they risk entrenching an individual’s dependence on an abusive partner,¹²⁶ the safeguards put in place in respect of conditionality clearly reduce the likelihood of the sanctions regime being held to contravene article 8 on this basis.

Conclusion and implications

While recent increases in the extent of conditionality in the UK welfare state and the severity of associated sanctions have been politically controversial, the most important legal challenge thus far has resulted in a finding of compliance with article 4 ECHR. This paper demonstrates that questions remain about the conformity of conditionality, and particularly the associated sanctions, with the UK’s human rights obligations and that *Reilly* is unlikely to be the last time courts are asked to rule.

The focus here has been on three ECHR rights closely linked with human dignity, specifically with three of the four elements of human dignity identified by McCrudden: prohibition of inhuman treatment (article 3), creation of the conditions for the satisfaction of essential needs (P1-1 and article 8) and assurance of individual autonomy (article 8). Although conditional benefits are not inherently incompatible with human rights law, potential for sanctions to infringe the rights focused on has been identified. Where this applies in specific cases, it might be possible for a court to find violation of an individual’s rights and provide a remedy without finding the policy as a whole incompatible. If the decision-making process or the severity of sanctions available were found incompatible with the state’s obligations, there might be a possibility of a declaration of incompatibility.¹²⁷ In Northern Ireland, where social security legislation closely follows Great Britain but where separate legislation is passed at devolved level, legislative provisions that contravene the Convention Rights would be invalid.¹²⁸

In summary, in some circumstances the cessation of benefit payments could through the impact on the claimant constitute inhuman and degrading treatment. However, this would depend on the claimant essentially being rendered unable to access food or shelter to such an extent and for such a period as to cause significant suffering. This probably implies individuals not awarded a hardship payment and with no accessible charitable or familial support. Given that this group is likely to be small, it is possible that any finding of violation of article 3 would be on the basis of individual circumstances rather than an unlawful policy. The protections for domestic violence victims discussed in section 3.1.3 may be sufficient to avoid a finding of breach of article 8 on the grounds of denial of individual autonomy.

¹²⁵ Lord Freud, HL Deb 27 Feb 2012 vol 735 no 271 col GC77

¹²⁶ R Lister, 2010, n121; Women’s Budget Group, ‘Universal credit: payment to joint claimants’ (Women’s Budget Group, 2011) ; Ad-hoc Committee, n121

¹²⁷ Human Rights Act 1998 c42 s4, 10

¹²⁸ Northern Ireland Act 1998 c47 s6

The argument that sanctions are incompatible with the satisfaction of essential needs appears better founded. The support available even to sanctioned claimants with a hardship payment is little higher than that deemed inadequate for asylum seekers, who have important expenses (notably utility bills) paid on their behalf. Any interference with the claimant's right to support with meeting his or her essential needs would have to be proportionate and non-arbitrary in order to comply with P1-1, compliance with which can be questioned. Article 8 provides further safeguards in respect of claimants with dependent children, whose welfare arguably must take precedence over the objectives of sanctions, to encourage jobseeking.

To avoid the risk of an adverse judgement, policymakers should consider changes to the sanctions regime. Ensuring that housing benefit continues uninterrupted while another benefit is subject to sanction and removing discretion from the award of a hardship payment where access to food or shelter is threatened would avoid risk of violation of article 3 ECHR. The adequacy of protection for domestic violence victims might be adequate to comply with article 8, although a clear statement of the priority to be given to the best interests of any child likely to be affected by sanctions, whether in legislation or in guidance to decision makers, is required. Again, removal of discretion from the award of a hardship payment where children are affected would be desirable. To ensure compliance with P1-1, the proportionality of the severity and duration of sanctions should be reconsidered with reference to all available evidence on their effectiveness in promoting transition from benefit to work, the suspension of benefits prior to the conclusions of the investigation into the alleged breach should be avoided and identified barriers to the appeals process addressed.

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Abbreviations used:

CESCR – Committee on Economic, Social and Cultural Rights

CFR – Charter of Fundamental Rights of the European Union

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR – European Court of Human Rights

ECSR – European Committee of Social Rights

ESC – European Social Charter

ICESCR – International Covenant on Economic, Social and Cultural Rights

IOL – International Labour Organisation

P1-1 – protocol one, article one (of ECHR)

UDHR – Universal Declaration of Human Rights

UNCRC – Convention on the Rights of the Child

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